SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 491

LEONA PEAK, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 In United States District Court for the Eastern District of Tennessee

Complaint

Filed on February 19, 1954

The plaintiff, Leona Peake, sues the defendant, United States of America, on a contract of National Service Life Insurance for Ten Thousand ($10,000.00) Dollars, and for cause of action states the following facts:

I

That plaintiff is a resident and a citizen of the United States of America, residing in Hamilton County, Tennessee, within the Southern Division of the Eastern District of Tennessee.

II

That jurisdiction of this Court is found in Sections 445 and 817, Title 38, of the United States Code, Annotated.

III

That during World War II, plaintiff's son, Oscar Charles Peake, Jr., was inducted into the military service of the United States, on April 29, 1943, and served in the Army until on or about July 30, 1943, when he disappeared, without intelligence or tidings concerning him since.

Plaintiff avers that the assured had attained the age of eighteen years; that he was devoted to his parents, to his young sister and other relatives, that he visited his home as often as he could and communicated with them regularly; that he did not have the training or ability to make a living alone or apart from his near relatives; that his personal habits were good, and that he was not dissolute or lacking in recognition or moral responsibility in any way.

That at the time of the disappearance of the assured he was a member of Company "B," 10th Infantry Training Battalion, Camp Wheeler, Georgia, and that his organiza-

2 tion on said date, or shortly thereafter, was en route to San Francisco; that the United States Army, ever since the disappearance of assured, has made every effort to locate him or to have intelligence or tidings of him; that the Federal Bureau of Investigation has also sought to locate him, and that plaintiff and his family have made every effort to locate him or to receive intelligence of him.

Plaintiff avers that the deceased had a policy of insurance in the American National Insurance Company, and in the case of Oscar C. Peake v. American National Life Insurance Co., No. 32168, in the Chancery Court of Hamilton County, Tennessee, on February 7, 1953, it was ordered, Adjudged and Decreed by the court that the deceased was eighteen years of age when he entered the military service of the United States; that he regularly communicated with his father and mother; that he returned to his home in Chattanooga to visit his parents when he was granted a leave of absence from military service, after which he returned to his post at Camp Wheeler, Georgia, and that the last communication or letter received by his parents or members of insured's family was on or about July 30, 1943, and that he disappeared from the military unit with which he was serving, and that diligent search was made by the military authorities but failed to account for his disappearance or whereabouts, and that diligent search and inquiry was made by the parents of the insured and members of his family, but that said search and inquiry disclosed no information or intelligence to account for his disappearance; and that the Federal Bureau of Investigation made diligent search and inquiry for the missing assured, but that its search and inquiry failed to disclose any information showing the reason for assured's disappearance or indicating his whereabouts, and that it appeared to the court that the insured had been absent and had not been heard from by those who ordinarily would have heard from him, for a period of more than seven years, and the court presumes and finds that the insured is dead and, under all the facts and circumstances disclosed by the evidence, finds and de-
3 crees that said insured died on or about July 30, 1943, the date of his mysterious and unexplained disappearance.

That during said period of military service in the Army of the United States, plaintiff's said son, Oscar Charles Peake, Jr., desiring to be insured against the risks of death and total and permanent disability, applied to the defendant for a policy of National Service life insurance, and was granted one for $10,000.00, Certificate No. N–10–661–104, effective May 1, 1943, in which plaintiff was named beneficiary, and that said certificate, as was the custom, was duly issued to plaintiff's son, under said number, and by the terms thereof the defendant agreed to pay to assured's beneficiary, in the event of death, said sum of $10,000.00; and in event of total and permanent disability was to waive premiums on said policy, incurred during the life of said insurance contract—as provided by the Acts of Congress.

IV

That during the life of said insurance contract, and while plaintiff's said son was in the military service of the United States of America, as aforesaid, and at the time of said disappearance, as aforesaid, and while said policy was in full force and effect, he became, was, and continued to be until his death, totally and permanently disabled from following continuously any substantially gainful occupation, as result of the following diseases, ailments and injuries: cholera, nervous trouble, mental trouble, St. Vitus Dance, general debility and weakness and despondency.

That by reason of the foregoing, plaintiff's said son became, and was totally and permanently disabled from engaging continuously in any substantially gainful occupation, and was entitled to a waiver of the premiums on said policy and to have said policy continue in full force and effect until his death; and plaintiff avers that under the circumstances of his disability and disappearance the law presumes and she avers that he died on or about July 30, 1943, and while the policy was in full force
4 and effect and plaintiff avers that on or about July 30, 1950, at the expiration of said seven years, she became entitled to the full proceeds of said policy as beneficiary therof, and to be paid the sum of $10,000.00.

That plaintiff made due application to the defendant, through the Veterans Administration, for the benefits accruing to her under said policy, and made due proof thereof and demanded payment of the aforesaid amount and to have said insurance contract construed as being in full force and effect at the time of assured's death, but the defendant has disagreed with said plaintiff as to her claim for the benefits under said policy and has wholly failed and refused to pay said sum, or any part thereof, or to treat said insurance as being in full force and effect at the time of the death of plaintiff's said son; and plaintiff was lawfully advised, on or about July 18, 1951, by Registered Mail, of the decision of the Veterans Administration, and that a disagreement existed, and plaintiff avers that at the time during which her application for said insurance was pending before the Veterans Administration, the seven year period of her son's unexplained absence tolled the statute of limitations, and that the six years statute of limitations has not yet expired, and that she is now entitled to collect said insurance in this court and cause.

V

Wherefore, the plaintiff, Leona Peake, prays that she be given a decree against the defendant, decreeing that the assured was totally and permanently disabled from engaging in any substantially gainful occupation at the time of his said disappearance, and that he was entitled to a waiver of premiums on said policy from and after his said disappearance, and that said policy was in full force and effect at the time of his death, on or about July 30, 1943, and that she is entitled to recover the full amount of said policy of National Life Insurance for $10,000.00, as provided by law, and that a proper allowance be made for the benefit of her attorneys, not to exceed ten per cent (10%) of the judgment, and for such other relief as the plaintiff may be entitled to in the premises.

Plaintiff prays for such processes, orders, decrees and judgments as may be necessary to bring the defendant before the court and to fully protect the interest of plaintiff on account of the aforesaid contract of insurance.

Plaintiff demands a jury to try the issues in this cause when joined.

JOHN S. WRINKLE,
C. G. MILLIGAN,
Hamilton National Bank Building,
Chattanooga, Tennessee,
Attorneys for Plaintiff.

In United States District Court

Motion to dismiss

Filed July 20, 1954

Comes the United States of America and moves the Court to dismiss the complaint of Leona Peake for the following reasons:

1. The court has no jurisdiction of the subject matter.
2. The complaint fails to state a claim upon which relief can be granted.

JOHN C. CRAWFORD, Jr.,
United States Attorney,
Address: 362 Federal Bldg., Chattanooga 2, Tenn.
JOHN P. DAVIS, Jr.,
Assistant U. S. Attorney.

In the United States District Court

Memorandum opinion on motion to dismiss

Filed February 10, 1955

For insufficiency of the claim for relief, the defendant has filed a motion to dismiss the plaintiff's action which was instituted for recovery under a National Service Life Insurance policy.

6 Material parts of the complaint set out that the plaintiff's son, Oscar Charles Peake, Jr., was inducted into the military service of the United States on April 29, 1943, and served in the army until on or about July 30, 1943, when he disappeared from Camp Wheeler, Georgia; that there has been no evidence concerning his existence or whereabouts since; that during the period of his military service he acquired a policy of insurance for $10,000 under the provisions of the National Service Life Insurance Act, which policy was effective May 1, 1943, in which plaintiff was named as beneficiary; that pursuant to a suit in a local equity court a judgment was entered on February 7, 1953, in which the court announced that the soldier was presumed to be legally dead and adjudged that his death occurred on or about July 30, 1943, the date of the mysterious and unexplained disappearance; that before the issuance of the policy the soldier had become totally and permanently disabled and that his ailments and injuries were, "Chorea, nervous trouble, mental trouble, St. Vitus Dance, general debility and weakness and despondency"; that the plaintiff made due application to the Veterans Administration for the benefits under the policy, but the defendant disagreed and declined to pay; and that the seven year period of her son's unexplained absence tolled the statute of limitations.

The Plaintiff's right of recovery depends on whether the adjudication of the state court declaring him to be dead as of July 30, 1943, is effective under federal law. Necessarily the judgment of the state court was based upon Tennessee statutory law. Williams Code of Tennessee, Vol. 5, pocket part, Chapter 5, particularly sections 8407.10 (1) and 8407.19 (2).

The Court reaches the conclusion that the judgment of the state court has no efficacy in support of plaintiff's claim.

Under the general provisions pertaining to benefits under the law administered by the Veterans Administration, there is provided a definite prohibition against any state law being ap-

7 plicable for presumption of death. Title 38 U. S. C. A., section 32a. The same provision is carried into the National Service Life Insurance Act itself, codified at Title 38 U. S. C. A., section 810. The language is so plain that no one can err thereby and is as follows: "No State law providing for

presumption of death shall be applicable to claims for National Service Life Insurance."

The general provisions at said section 32a and in the National Service Life Insurance Act, at said section 810, provide that unexplained absence for seven years will presume death as of the date of the expiration of such period. Therefore, the presumption of death of this soldier would have to be on or about July 30, 1950, the end of seven years after his disappearance.

There is no allegation that the soldier made application for waiver of payment of premiums because of total disability within a year after August 1, 1946 and, in fact, there is no allegation that he ever made application to the Administrator for a waiver. Therefore, if it could be inferred that the plaintiff made application for waiver when she made application for the payment of the insurance, such action would not bring the plaintiff into the right of benefits under the Act. Scott v. United States (5th Circuit 1951), 189 F. 2d 863, certiorari denied 342 U. S. 787, 96 Law Ed. 660; Hendricks v. United States (D. C. E. D. Tenn.), 94 F. Supp. 142.

In addition there is no allegation in the complaint that the insured did not make timely application for waiver of premium due to circumstances beyond his control, or that the Administrator granted such waiver under such circumstances.

The law concerning waiver because of disability is found in the Act, as codified, in Title 38 U S. C. A., section 802 (n).

The Court was concerned as to why there would be put into the National Service Life Insurance Act the provisions for presumption of death after seven years absence, but at least one reason could be that a soldier might have been released from paying premiums because of permanent and total disability and thereafter presumption of death set up whereby a beneficiary would be entitled to the insurance.

8

In this case, under the Act itself as heretofore pointed out, this soldier, assuming the allegations of the complaint to be true, would be presumed to be dead as of July 30, 1950. The soldier not having made the required application for waiver of payment of premiums because of total disability and having same granted for future or past premiums, and not having alleged any facts that would excuse the making of the timely application, this insurance policy lapsed in 1943 and is not effective.

The defendant's motion is granted and the case is dismissed at plaintiff's costs.

Order accordingly.

(S) LESLIE R. DARR,
United States District Judge.

In United States District Court

Order of dismissal

Filed February 15, 1955

On motion of the United States Attorney and for good and sufficient causes to the Court appearing, as set forth in a memorandum this day filed,

It is ordered that this case be, and the same is hereby, dismissed at the plaintiff's cost.

Approved for entry:

LESLIE R. DARR,
Judge.

9 In United States Court of Appeals for the Sixth Circuit

Argument and submission, February 2, 1956 [omitted in printing].

In United States Court of Appeals

Judgment

Filed February 14, 1956

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

10 No. 12511

In United States Court of Appeals For the Sixth Circuit

LEONA PEAK, APPELLANT

v

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

Opinion

February 14, 1956

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

SIMONS, Chief Judge. The appellant was the beneficiary in a National Service Life Insurance policy issued to her soldier son. Her suit to recover on the policy was dismissed on the ground that the Court had no jurisdiction of the subject matter and that her complaint failed to state a claim upon which relief could be granted. The basic facts are not in dispute.

Oscar Charles Peak, Jr., the son, was inducted during World War II into the military service of the United States on April 29, 1943. On July 30th of that year, after his unit was ordered to proceed from Camp Wheeler, Georgia to San Francisco, he disappeared and all efforts made by the Army, the FBI, and his family to locate him proved futile. On February 7, 1953, the Chancery Court of Hamilton County, Tennessee, in a suit upon a commercial policy, decreed that not having been heard from for more than seven years he died on or about the date of his disappearance, July 30, 1943. The appellant made due application to the Veterans' Administration, in 1951, for the benefits accruing to her under the policy. Her claim was denied and she brought
11 suit against the Government on the policy on February 29, 1954, based upon the presumption that more than seven years having expired since the insured was last heard from, he was now dead and that the death occurred as of the date of his disappearance, July 30, 1943. It is conceded that the insured did not make timely application for waiver of premium due to circumstances beyond his control, and that no one made such application on his behalf. The District Court held that his policy had lapsed.

The appellant alleges that during the life of the policy, and before the soldier's disappearance, her son was afflicted with chorea, nervous trouble, mental trouble, St. Vitus Dance, general disability, and weakness and despondency; that from his condition at that time a presumption arose that he died on or about July 30, 1943. She, therefore, contends that she became entitled to the full proceeds of the policy.

Title 38, Sec. 810, U. S. C. A., provides:

"No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Administrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may, for the purpose of this subchapter, be considered as sufficiently proved."

It will be noted that the above Section permits a finding that, after the lapse of seven years of unexplained absence, the insured

is dead. It raises no presumption, however, as to the time of his death. The courts have held that the trier of facts may infer that he died before the expiration of the seven years, if it appears that within that period he had encountered some specific peril or come within the range of some impending or imminent danger which might reasonably be expected to destroy life. Davie v. Briggs, 97 U. S. 628, or the time may be shortened by proof of facts and circumstances connected with disappearance as would show death at an earlier date. Fidelity Mutual Life Assurance v. Mettler, 185 U. S. 308.

The complaint herein alleges no circumstances sufficient to support an inference that at the time of the insured's disap-
12 pearance he was in danger or peril and his infirmities if proved are not such as to support an inference that he died while the policy was in force or during the period that the policy could have been revived by a waiver of premiums timely sought. We agree with the decision of the district judge that the claim states no cause of action and, in any event, is barred by limitation. Wherefore, the judgment of the court must be, and it is,

Affirmed.

13 Petition for rehearing covering 5 pages filed March 3, 1956, omitted from this print.

It was denied, and nothing more by order of March 12, 1956.

14 In United States Court of Appeals

Order denying rehearing

March 12, 1956

The petition for rehearing is denied.

15 [Clerk's certificate to foregoing paper omitted in printing.]

16 Supreme Court of the United States

No. 22 Misc. —, October Term, 1956

LEONA PEAK, PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Order allowing certiorari

October 8, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 491 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.